

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT and LICENSE NO. 440154
Issued to: Alvin Henry MANDLY Z-961 084

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2227

Alvin Henry MANDLY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 5 December 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for 3 months on 12 months' probation, upon finding him guilty of negligence. The specifications found proved allege that while serving as Chief Officer on board the SS AUSTRAL ENDURANCE under authority of the license above captioned, on or about 13 June 1978, Appellant failed to properly supervise maintenance work being performed on the starboard lifeboat gear and that this failure to supervise led to an injury being suffered by Cadet Edward Coll.

The hearing was held at New York, New York, on 15 June and 16, 23 and 24 July 1979.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of Deck Cadet Edward Coll; and Michael Cerullo, Deck Maintenance, AUSTRAL ENDURANCE. The Investigating Officer also introduced nine exhibits: (1) a copy of a 4 June 1979 letter forwarding the charge sheet to Appellant; (2) and (3) certified copies of abstracts of the Shipping Articles for the vessel; (4) a certified copy of the vessel's official logbook; (5) copy of CG-924E submitting report of injuries to Cadet Coll; (6) a sketch of the starboard lifeboat winch made by Cadet Coll; (7) photographs of the starboard lifeboat winch; (8) a sketch of the starboard lifeboat winch made by Cerullo; (9) certified copy of pages 30 and 31 of CG-175 entitled "Manual for Lifeboatmen."

In defense, Appellant offered in evidence his own testimony, and four pieces of documentary evidence: (1) photograph of starboard lifeboat winch, (2) statement by Michael Cerullo, (3) letter by the master of the AUSTRAL ENDURANCE, and (4) a letter by

the Marine Superintendent of Farrell Lines, Inc.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He served a written order on Appellant suspending all documents issued to him for a period of three months on twelve months' probation.

The entire decision was served on 17 December 1979. Appeal was timely filed on 3 January 1980 and perfected on 7 April 1980.

FINDINGS OF FACT

On 13 June 1978, Appellant was serving as Chief Officer on board SS AUSTRAL ENDURANCE and acting under authority of his license while the vessel was in the port of Auckland, New Zealand.

On a previous voyage when Appellant was not on board, the starboard lifeboat had been lowered into the water. While the boat was being raised, the wire on the starboard lifeboat drum became slack due to the rolling of the vessel. This caused a turn of the wire to rest on the drum instead of fitting into one of the grooves on the drum.

On 13 June 1978, while the vessel was moored in Auckland, New Zealand, Appellant assigned two crewmembers to work on the starboard lifeboat in order to clear the wire on the drum. Coll, the deck cadet assigned to the vessel for training, was directed to observe the work in progress.

At approximately 0915, Appellant proceeded to the area of the starboard lifeboat winch to supervise the work. Upon his arrival he found that the boat had been placed in the water but that the turn of wire in question was still on the drum and the falls had to be further overhauled to remove the turn. Appellant then attempted to use a handcrank to turn the drum in order to turn the wheel counterclockwise in an effort to get more wire off the drum. Coll assisted.

After the wheel had been turned about three times, one of the crewmen informed Appellant that the wire was now clear on the drum. At this time, Appellant left the crank in the hands of Coll. Shortly thereafter, Appellant told Coll to "take the handle out." Appellant did not see Coll make any kind of move to remove the crank but took it for granted that he did. In fact, Coll did not hear Appellant's order to remove the crank and neither acknowledged Appellant's order nor removed the crank. There was no other noise in the area at the time.

After examining the drum, Appellant activated the safety

emergency disconnect switch and activated the winch motor. Almost immediately, the crank, which was still in the winch wheel, struck Coll on the head. As a consequence, Coll sustained fractures of his jaw, cheekbone, and several other bones. In addition, he suffered a serious loss of vision in his right eye due to irreparable damage to the optic nerve. As a result of his injuries, Mr. Coll is unable to qualify for a Coast Guard license or for a commission in the armed forces.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that: (a) the Administrative Law Judge's findings of fact are not supported by substantial evidence of a reliable and probative character; (b) the Administrative Law Judge improperly applied the wrong standard of negligence to the facts of this case.

APPEARANCE: Lilly, Sullivan and Purrell, PC;17 Battery Place,
New York, New York 10004, by George W. Sullivan, Esq.

OPINION

I

Appellant makes two contentions on appeal. The first is that the findings of fact of the Administrative Law Judge are in error and not supported by substantial evidence of a reliable and probative character. In effect, Appellant seeks a reversal of certain of the Administrative Law Judge's findings of fact.

In support of his first contention, Appellant has submitted a lengthy and well thought out brief in which he identifies those specific findings to which he takes exception. Appellant then sets forth his interpretation of the evidence and testimony derived from the hearing. Not surprisingly, Appellant uses his interpretation to arrive at facts which from those found by the Administrative Law Judge. In essence then, Appellant supplies an alternative interpretation of the evidence received at the hearing and urges that his interpretation be adopted vice that of the Administrative Law Judge. This I decline to do.

The Administrative Law Judge is the arbiter of facts. As such, it is his duty to evaluate the testimony and evidence presented at the hearing. There is longstanding precedent in these suspension and revocation proceedings that the findings of fact of the Administrative Law Judge are upheld unless they can be shown to be arbitrary and capricious (Decision on Appeal No. 2097) or there is a showing that they are clearly erroneous (Decision on Appeal

No. 2108). Although the interpretation of the testimony by the Appellant may differ from that of the Administrative Law Judge, there has been no showing that the findings of fact of the Administrative Law Judge are either arbitrary and capricious or clearly erroneous. Accordingly, the findings of fact of the Administrative Law Judge are approved.

II

On the second point of appeal, Appellant contends that the Administrative Law Judge applied the wrong standard of negligence in this case. Negligence is defined at 46 CFR 5.05-20(a)(2) as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances would not fail to perform." This is the standard of negligence applicable in this case.

The act of negligence with which Appellant is charged is the failure to "properly supervise the maintenance being performed by the crew to the starboard lifeboat gear." Specifically, evidence was adduced that Appellant negligently activated the electrical winch without first ascertaining whether Cadet Coll had removed the crank. Although Appellant told the Cadet to remove it, he neither checked to see whether Coll had complied nor received verbal confirmation from Coll that the order had been carried out. In light of the serious injuries which could (and in fact, did) result from the activation of the electric motor while the handcrank was still inserted, I conclude that it was indeed negligence to have done so without first ascertaining, either by personal observation or confirmation of the order, that the handcrank had in fact been removed.

In his brief on appeal, Appellant intimates that the Administrative Law Judge erred by holding him to the standard of being an "insurer" rather than holding him to the standard of a "reasonable prudent person". In doing so, Appellant seizes upon the use of the word "insure" in the Administrative Law Judge's decision and expands that word out of proportion and context. As defined by Webster's New Collegiate Dictionary, G&C. Miriam Co., (1977), "insure" is defined as "to make certain especially by taking necessary measures and precautions." The use of the word "insure" by the Administration Law Judge was not meant to imply that Appellant was an insurer in the sense of an underwriter of liability. The standard to which Appellant was appropriately held was that of a "reasonably prudent person."

Also in his brief on appeal, Appellant makes a passing reference to Cadet Coll's contributory negligence in this accident. Mr. Coll's contributory negligence, if any, is not dealt with by the Administrative Law Judge. This is clearly appropriate. Even if Cadet Coll had been contributorily negligent, it is not a defense to the charge of negligence but is rather a matter in mitigation. Accordingly, the Appellant cannot be relieved of liability in this proceeding as a result of any contributory negligence on the part of Coll.

CONCLUSION

There is evidence of a substantial and probative nature in the record which supports the findings of the Administrative Law Judge. The order entered by the Administrative Law Judge is neither arbitrary nor capricious.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 5 December 1979, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 30th day of July 1980.

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